In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 523

UNITED INSURANCE COMPANY OF CHICAGO, ILLINOIS, a corporation, CHARLES JOSEPH, SAM JOSEPH and LOUIS HIRSCHORN,

Petitioners,

vs.

JOHN R. MALONEY, individually and as Insurance Commissioner of the State of California,

Respondent.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

In his brief filed in opposition to petitioners' Petition for a Writ of Certiorari, respondent advances essentially two contentions of fact and one of law:

(1) That respondent has never conceded that petitioners in the trial court *proved* that he was

guilty of intentional discrimination, nor did any court so find;

(2) That, contrary to petitioners' claim, respondent did *not* in fact deny under oath the merit of petitioners' claim of intentional discrimination by him, and therefore to compel petitioners to submit the issue of intentional discrimination to respondent for hearing and determination by him will not deny petitioners due process of law;

(3) That petitioners are claiming a constitutional right to a particular remedy, whereas another adequate remedy is available.

Each contention is unsound.

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1. THERE IS NO ISSUE AS TO THE SUFFICIENCY OF THE EVIDENCE.

Respondent's statement that he has never expressly conceded that he was guilty of intentional discrimination, and that the trial court made no express finding to that effect, is correct. The fact remains, however, that petitioners presented evidence of intentional discrimination, and that the trial court held (implicitly but necessarily) that such evidence sufficiently met the requirements of California law. It is true, as counsel states (brief in opposition to petition for certiorari, p. 4) that, on an application for a preliminary injunction, California law does not require conclusive proof by the party seeking the relief or even that degree of proof required to prevail upon

a trial on the merits. That rule, however, is adopted to make injunctive relief more available, not less, to parties seeking it.

It is a clear perversion of such a rule of law, intentionally solicitous of the rights of plaintiffs seeking relief, to turn it around (as respondent seeks to do) and say, After all, the trial court never *found* intentional discrimination, therefore you did not prove it, and therefore your claim is without merit. The trial court in granting the preliminary injunction, *did* find that all the showing of intentional discrimination required by California law for issuance of a temporary injunction had been made. At no time since has respondent challenged that finding as not justified by the evidence. Instead he has chosen to rely purely on the narrow contention that the trial court lacked any authority to grant relief, regardless of the factual showing; a contention which, if valid, applies to any case no matter how conclusively intentional discrimination is shown.

It seems paradoxical for respondent to admit that the law of California grants relief in the trial court on a sufficient showing of intentional discrimination and resultant damage without final "proof" thereof, and then to argue in this Court that petitioners, who have met every such test, have no standing for any relief because they did not "prove" their case in the trial court.

No matter how respondent attempts to obscure it, his legal position reduces to the proposition that proof

of great and irreparable damage by an intentionally discriminatory, and therefore unconstitutional, administrative proceeding does not authorize judicial relief until the administrative proceeding has been finally completed and the damage done. That is the question presented in our petition for certiorari, and that is the question posed by this case.

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2. RESPONDENT DID DENY UNDER OATH THE CHARGES AGAINST HIM. IT THEREFORE WOULD DENY DUE PROCESS FOR HIM TO PASS UPON SUCH CHARGES.

Respondent seems to claim that his affidavit (Aff. of Maloney, Exhibit B) did not in fact deny "the merits of the petitioners' claim of discrimination" (Respondent's brief in opposition to petition for Certiorari, p. 6), nor express himself "under oath or otherwise, as to the merit or demerit of the charges of discrimination" (Respondent's brief in opposition to certiorari, p. 7) and therefore presumably has an open mind to pass upon such charges in an administrative hearing.

This contention is completely erroneous.

The essence of petitioners' case is that respondent was guilty of *intentional* discrimination against them in commencing and prosecuting the administrative proceedings complained of. Intentional discrimination, if it exists, violates their constitutional rights. Random or chance discrimination, on the other hand, does not violate the Equal Protection clause and

would not violate their constitutional rights. *Sunday Lake Iron Co. v. Wakefield,* 1918, 247 U.S. 350, 353; *Snowden v. Hughes,* 1944, 321 U.S. 1, 7. Proof of intention to discriminate was therefore an essential part of petitioners' case, and they presented such proof to the trial court.

Respondent has denied any such intention flatly and unequivocally under oath. See Affidavit of Maloney, Ex. B, p. 4, lines 13-24:

> "*I had no intention whatsoever* at the time of the issuance of the Accusation against United Insurance Company not to institute similar proceedings against other insurers which may be in violation of the law, *I have had no such intention at any time since and I have no such intention at this time.* I have not at any time instructed any member or members of my staff not to institute disciplinary proceedings against other insurers, I know of no such instruction by any one else in authority in the Department and I categorically deny that any such instructions exist or have ever existed, or that there is any understanding of any kind among the staff of the Department to such effect." (Emphasis added.)

If this does not constitute "prejudgment", it is hard to imagine what does. After this, to be required to submit to respondent, sitting as a "judge", the issue whether he had the intention to discriminate, would make a farce of the "fair trial" guarantee of the Due Process clause.

3. PETITIONERS ARE ENTITLED TO AN EFFECTIVE REMEDY.

Respondent also contends that petitioners in essence are claiming a constitutional right to a particular remedy, that they have no such right, and that an "adequate remedy" is offered them by judicial review at the close of the administrative proceeding. Petitioners concede that no constitutional right to a particular remedy exists, but the very cases cited by respondent hold that the Constitution does guarantee the preservation of their substantial rights to redress by "some *effective* procedure." See *Gibbs v. Zimmerman,* 1933, 290 U.S. 326 at 332; *Hardware D. Mut. F. Ins. Co. v. Glidden Co.,* 1933, 284 U.S. 151 at 159. The right petitioners seek to vindicate is the right not to be damaged by the initiation and prosecution of an intentionally discriminatory administrative proceeding; the damage is done by the hearing, and the right can be protected only by enjoining the hearing. Judicial review *after* the damage has been done is no relief at all.

It would have been more candid for respondent to take the position he took before the District Court of Appeals, which was—not that petitioners had an alternative remedy which was equally "adequate"—but rather that no remedy at all exists to protect anyone from damage, however grievous, caused or threatened from the initiation and prosecution of an intentionally discriminatory administrative proceeding.

4. CONCLUSION.

The foregoing shows:

(1) that there is no issue as to the sufficiency of the proof of unconstitutional discrimination;

(2) that the evidence conclusively demonstrates that respondent has prejudged the case he seeks to try;

(3) that petitioners are entitled to the relief they seek, unless this Court is to hold that no effective remedy exists to prevent irreparable damage caused by unconstitutional discrimination in the initiation and prosecution of an administrative proceeding.

The petition for certiorari should be granted.

Dated, San Francisco, California,
January 31, 1955.

Respectfully submitted,
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